Supreme Court, U.S.
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No. 05-882

In The

Supreme Court of the United States

SHEBOYGAN COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

RACHEL B.,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal Adoption and Safe Families Act of 1997 – enacted for the express purpose of promoting the adoption of children in foster care, and tying federal foster care funding incentives to the states' implementation of conforming statutes – preempts the application of a Wisconsin law serving to retroactively strip the trial court of competency to hear and decide a TPR case for a technical violation of a time limit statute.

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OPINION BELOW

The opinion of the Supreme Court of Wisconsin is found in *Sheboygan County Dept. of Social Services v. Matthew S. and Rachel B.* at 282 Wis.2d 150, 698 N.W.2d 631 (June 22, 2005). The opinion is reproduced at Appendix 1.

JURISDICTION

The opinion of the Supreme Court of Wisconsin reversing the Wisconsin Court of Appeals decision below, was entered on June 22, 2005. The Supreme Court of Wisconsin is the court of last resort in Wisconsin. The question of whether Congressional intent and national foster care policy set by the federal Adoption and Safe Families Act of 1997 were at odds with the ruling of the Supreme Court of Wisconsin was presented to Wisconsin's high court in the Petitioner's Motion for Reconsideration and denied on October 17, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) on the claim that the Wisconsin law is in direct conflict with a law of the United States. Pursuant to Rules 14.1(e)(v) and 29(3)(c) of the Supreme Court of the United States, the requirements of 28 U.S.C. § 2403(b) may apply in this case. Three copies of this Petition for Writ of Certiorari will therefore be served on the Attorney General for the State of Wisconsin.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United State Constitution, Article VI, cl.2:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

42 U.S.C. § 671(a)(15)(D)(i). "State plan for foster care and adoption assistance."

(a) Requisite features of State plan. In order for a State to be eligible for payments under this part [42 USCS §§ 670 et seq.], it shall have a plan approved by the Secretary which –

(15) provides that –

(D) reasonable efforts of the type described in subparagraph (B) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that –

(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

42 U.S.C. § 673b(d)(1). "Adoption incentive payments."

(d) Adoption incentive payment.

(1) In general. Except as provided in paragraph (2), the adoption incentive payment payable

to a State for a fiscal year under this section shall be equal to the sum of –

(A) $ 4,000, multiplied by the amount (if any) by which the number of foster child adoptions in the State during the fiscal year exceeds the base number of foster child adoptions for the State for the fiscal year;

(B) $ 2,000, multiplied by the amount (if any) by which the number of special needs adoptions that are not older child adoptions in the State during the fiscal year exceeds the base number of special needs adoptions that are not older child adoptions for the State for the fiscal year; and

(C) $ 4,000, multiplied by the amount (if any) by which the number of older child adoptions in the State during the fiscal year exceeds the base number of older child adoptions for the State for the fiscal year.

42 U.S.C. § 675(5)(E). "Definitions."

(5) The term "case review system" means a procedure for assuring that –

(E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in

serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless –

(i) at the option of the State, the child is being cared for by a relative;

(ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or

(iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 471(a)(15)(B)(ii) [42 USCS § 671(a)(15)(B)(ii)] are required to be made with respect to the child;

Wis. Stat. § 48.315, Delays, Continuances and Extensions.

(2) A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as it is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

Wis. Stat. § 48.417, Petition for termination of parental rights; when required.

(1) FILING OR JOINING IN THE PETITION; WHEN REQUIRED. Subject to sub. (2), an agency or the district attorney, corporation counsel or other appropriate official designated under s. 48.09 shall file a petition under s. 48.42(1) to terminate the parental rights of a parent or the parents of a child, or, if a petition under s. 48.42(1) to terminate those parental rights has already been filed, the agency, district attorney, corporation counsel or other appropriate agency shall join in the petition, if any of the following circumstances apply:

> (a) The child has been placed outside of his or her home, as described in s. 48.365(1) or 938.365(1), for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or the first 6 months of any period during which the child was returned to his or her home for a trial home visit. If the circumstances specified in this paragraph apply, the petition shall be filed or joined in by the last day of the 15th month, as described in this paragraph, for which the child was placed outside of his or her home.

STATEMENT OF THE CASE

Joshua J.S., born October 10, 2001, is the biological son of Matthew S. and Rachel B. He was placed in foster care at birth because Matthew had previously abused another of Rachel's children, Joshua's half-brother. A Wisconsin court determined that Joshua was found to be a child in need of protection and services when he was less

than two months old. Joshua has never lived at home with Rachel.

The court required Rachel to meet a number of conditions before Joshua could be returned to her. These conditions included that she be truthful and forthright with information to the social worker and service providers; maintain employment; explore issues of co-dependency and dependency and understand the need for self-sufficiency; demonstrate that she could protect her children and prioritize their needs over others; share her residence only with persons pre-approved by the assigned social worker; and establish and maintain an independent, suitable residence with sufficient food, clothing, bedding, adequate furniture and adequate supervision to meet Joshua's needs.

Fifteen months after the court's order setting these conditions – as required by a Wisconsin statute[1] enacted to conform with the federal Adoption and Safe Families Act of 1997 – the Department filed a petition to terminate both Matthew's and Rachel's parental rights based on a continuing need for protection and services under Wis. Stat. § 48.415(2). The Department alleged that Rachel had violated the above-mentioned court orders by lying about the number of times she had worked as an exotic dancer; lying about looking for work when she was on Huber release from the Sheboygan County jail; failing to consistently follow through with counseling on a regular basis; being unable to demonstrate the ability to protect her children and act in their best interest; and failing to establish a proper residence needed for Joshua's return.

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[1] Wis. Stat. § 48.417(1)(a).

Rachel's and Matthew's fact-finding hearings were severed, and after a three-day fact-finding hearing, a jury found that grounds existed for terminating Rachel's parental rights on the basis of a continuing need for protection and services. Rachel's and Matthew's parental rights were terminated on October 30, 2003, and guardianship and custody of Joshua were transferred to the State Department of Health and Family Services.

Rachel appealed the decision on the ground that the circuit court lost competency to proceed by technically violating a statutory requirement governing time limits for hearing the case. It is undisputed that the trial court granted otherwise valid continuances in the case to accommodate both its calendar and the turnover in Rachel's three attorneys. However, the trial court failed to timely grant the first of these continuances "in open court" as required by the language of the state statute.[2]

The Wisconsin Court of Appeals ruled that Rachel had effectively waived her right to bring this argument by not raising it first in the trial court. (App. 44) A sharply divided Wisconsin Supreme Court reversed the Court of Appeals, a majority of four justices holding that a challenge to competency could not be waived, and noting that "children such as Joshua S., and their parents, clearly have a due process right" to have their cases governed by the state time limits statute. (App. 20) The three dissenting justices maintained that this decision was wrong because it failed to make the child's best interest paramount, as required by state law. (App. 23) The Department filed a Motion for Reconsideration, arguing that

[2] Wis. Stat. § 48.315(2).

Congress' passage of the Adoption and Safe Family Act of 1997 had redefined the landscape of what "due process" required in termination proceedings. (App. 48) The Department had earlier brought the federal law's importance to the Court's attention in the case in a supplemental authority letter filed prior to oral argument in the case. (App. 53) The Wisconsin Supreme Court denied the Motion for Reconsideration without comment on October 17, 2005, with a dissent by Justice Prosser. (App. 47)

REASONS FOR GRANTING THE PETITION

The Petitioner respectfully asks this Court to grant review on certiorari in this case because the strict application of Wisconsin's time limits statute[3] governing termination of parental rights actions directly conflicts with and thwarts the Congressional goals and directives of the federal Adoption and Safe Families Act (ASFA) of 1997.[4] The federal law was enacted for the express purpose of promoting the adoption of children in foster care and ensuring that children are provided a permanent home as early as possible. All fifty states have adopted ASFA conforming statutes as a condition of receiving federal foster care funds.

The question of whether the Wisconsin time limits statute – enacted long before the federal law boldly reshaped national policy regarding foster care and adoption – might act in direct opposition to the Adoption and Safe Families Act of 1997 is not new. This inherent conflict was pointed out several years ago in a Marquette Law Review article entitled *The Clock is Ticking: Do the Time Limits in Wisconsin's Termination of Parental Rights Cases Serve the Best Interests of Children?* In this prescient analysis, Attorney Thomas J. Walsh outlined the evolution of federal and state foster care policy and statutes, and noted that "[t]he policies set forth by the Wisconsin Children's Code as well as the federal and state Adoption and Safe Families Act seem to be at odds with a plain language view of the time limit structure in Chapter 48. . . . A situation could certainly be imagined where grounds exist

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[3] Wis. Stat. § 48.315(2).

[4] P.L. 105-89, 111 Stat. 2155 (1997).

to terminate parental rights and the state is required to file such a petition under the Adoption and Safe Families Act but, in the process of the termination case, the time limits are violated and the matter is dismissed."[5]

That case is in fact now before this Court.

It pits a state time limits statute – which was enacted in 1978 largely to remedy serious failures of due process for juveniles accused and adjudicated of criminal activity – against a more recent federal law and national foster care and adoption policy which effected a sea change in priorities for the nation's foster care system. As one commentator has described this change in direction, "[w]ith the passage of the 1997 Adoption and Safe Families Act ("ASFA"), foster care funding laws have shifted the emphasis from family preservation to child safety with the attention of assuring permanency for children with the understanding that such a shift may mean giving up on parents."[6] Congress sought to achieve its aims by a threefold strategy to promote an increase in adoptions nationwide: it relieved the states of the requirement to provide "reasonable efforts" to assist family reunification where children have been abused or neglected;[7] it provided cash incentives to states that increase the number of adoptions on a yearly basis;[8] and of particular import in this case, it

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[5] Thomas J. Walsh, *The Clock is Ticking: Do the Time Limits in Wisconsin's Termination of Parental Rights Cases Serve the Best Interests of Children?* 83 Marq. L. Rev. 743, 763 (Summer, 2000).

[6] Deborah L. Sanders, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Foster Care Funding Statutes from 1961 to Present*, 29 J. Legis. 51, 52 (2002).

[7] 42 U.S.C. § 671(a)(15)(D)(i).

[8] 42 U.S.C. § 673b(d)(1).

required the states to initiate termination petitions in most cases where children had been in foster care for fifteen of the previous twenty-two months. [9]

It has been well established in courts elsewhere in the nation that ASFA created a new framework and set of national priorities governing foster care and termination proceedings. The Supreme Court of Delaware recently reaffirmed "that the goal of the Adoption and Safe Families Act is to find permanency for children by accelerating the entire welfare process out of a concern that too many children [in the United States] are spending the more important formative years in a legal limbo."[10] The Delaware high court had noted earlier that "the statutory framework enacted by both the [Delaware] General Assembly and Congress do not afford parents an unlimited period of time to address and resolve the issues that caused their children to be found dependent or neglected."[11]

The Supreme Court of Nebraska recently reviewed and approved the retroactive application of a state TPR (termination of parental rights) statute and noted that "the legislative history of [the statute] indicates that it was necessitated by the terms of the federal Adoption and Safe Families Act of 1997, which mandated certain changes to state juvenile codes as a condition to continued federal funding of certain state programs, including foster

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[9] 42 U.S.C. § 675(5)(E).

[10] *Butler v. Division of Family Services*, 880 A.2d 1037, 1042 (Del. August 5, 2005).

[11] *Hughes and Vernon v. Division of Family Services*, 836 A.2d 498, 505 (Del. 2003).

care."[12] The Court of Appeals of New York has similarly retroactively applied ASFA conforming state statutes, finding that the federal law was "remedial" in nature and noting that "ASFA was enacted to bring New York into compliance with the federal statute, which by its terms applies to all children in foster care on the date of its enactment."[13] The Supreme Court of New Jersey, reviewing a TPR proceeding, noted that "[w]ith the passage of the federal Adoption and Safe Families Act in 1997, Congress reemphasized the importance of permanency by shortening the timeframe within which each child's permanency goal must be achieved. Those statutes provide the public policy framework within which the 'best interests of the child' and the termination of parental rights standards of [the New Jersey statute] are applied."[14] And the Supreme Court of South Dakota upheld a termination of parental rights, negatively construing a state statutory requirement as achieving "a result sought to be eliminated by ASFA."[15]

The application of Wisconsin's time limits statute in this case, which had the effect of dismissing after trial and judgment a TPR case which had been brought in conformity

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[12] *Nebraska v. Suzette M.*, 261 Neb. 862, 867, 626 N.W.2d 549, 555-556 (Neb. 2001).

[13] *Raquel T. v. Angel Guardian Children and Fam. Services, Inc.*, 100 N.Y.2d 361, 370-371, 795 N.E. 2d 21, 26 (N.Y. 2003) ("ASFA was enacted to bring New York into compliance with the federal statute, which by its terms applies to all children in foster care on the date of its enactment.")

[14] *New Jersey Div. of Youth and Fam. Services v. P.P. and S.P.*, 180 N.J. 494, 511, 852 A.2d 1093, 1103 (N.J. 2004).

[15] *In the Interest of L.N.*, 2004 SD 126, ¶ 17, 689 N.W.2d 893, 899 (S.D. 2004).

with the requirements of the federal Adoption and Safe Families Act and fully exhausted the requirements of due process, clearly conflicts with both Congressional intent and national foster care and adoption policy. Because this state statute frustrates the Congressional purpose underlying the Adoption and Safe Families Act of 1997,[16] Petitioner respectfully asks this Court to accept this case for review.

Respectfully submitted,

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[16] See H.R. Rep. 105-77, pp. 7-9, "Purpose and Scope" and "Background and Need for Legislation."

In re the Termination of Parental Rights to Joshua S., a Person Under the Age of 18: Sheboygan County Department of Social Services, Petitioner-Respondent, v. Matthew S., Respondent-Co-Appellant, Rachel B., Respondent-Appellant-Petitioner.

No. 2004AP901

SUPREME COURT OF WISCONSIN

2005 WI 84; 282 Wis. 2d 150; 698 N.W.2d 631; 2005 Wisc. LEXIS 323

April 29, 2005, Oral Argument
June 22, 2005, Filed

COUNSEL: For the respondent-appellant-petitioner there were briefs by John J. Grau and Grau Law Office, Waukesha, and oral argument by John J. Grau.

For the petitioner-respondent the cause was argued by Mary T. Wagner, assistant district attorney, with whom on the brief was Joseph DeCecco, district attorney.

JUDGES: N. PATRICK CROOKS, J. WILCOX, J., dissents (opinion filed). PROSSER and ROGGENSACK, J.J., join the dissent.

OPINION BY: N. PATRICK CROOKS

OPINION:

N. PATRICK CROOKS, J. Petitioner Rachel B. seeks review of an unpublished decision of the court of appeals affirming an order of the Sheboygan County Circuit Court for the termination of her parental rights to Joshua S. Rachel B. argues on appeal that the circuit court lost competency to terminate her parental rights, because it violated the mandatory statutory time limitation set forth

in Wis. Stat. § 48.422(2) (2003-04).[1] The issue before this court is whether a competency challenge based on the violation of the statutory time limitation is waived if not first made before the circuit court.

We conclude such a competency challenge based on the violation of the statutory time limitation of Wis. Stat. § 48.422(2) cannot be waived, even though it was not raised in the circuit court. The court of appeals erred in extending the holding in *Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190, to violations of such a mandatory statutory time limitation under Wis. Stat. ch. 48. The circuit court did not hold the fact-finding hearing within the time limits established by § 48.422(2), and never granted a proper extension or continuance pursuant to Wis. Stat. §§ 48.315(1)(a) and (2),[2] and thus it lost competency to proceed before it ordered the termination of Rachel B.'s parental rights. Accordingly, we reverse the decision of the court of appeals, which had affirmed the order of the circuit court.

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[1] Unless otherwise indicated all references to the Wisconsin Statutes are to the 2003-04 edition.

Wisconsin Stat. § 48.422(2) states: "If the petition is contested the court shall set a date for a fact-finding hearing to be held within 45 days of the hearing on the petition, unless all of the necessary parties agree to commence with the hearing on the merits immediately."

[2] "The general requirements of § 48.315(2) control all extensions of time deadlines under the Children's Code." *State v. April O.*, 2000 WI App 70, ¶ 5, 233 Wis. 2d 663, 607 N.W.2d 927.

Wisconsin Stat. § 48.315(2) states: "A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases."

I

Rachel B. gave birth to Joshua S. on October 10, 2001. On November 30, 2001, the circuit court determined that Joshua S. was at risk of physical abuse and in need of protection or services, pursuant to Wis. Stat. §§ 48.13(3m) and (10). The court ordered that Joshua S. be placed in a licensed foster home and imposed Children in Need of Protection or Services (CHIPS) conditions on Rachel B. and her husband, Ronald B. Ronald B. was presumed to be Joshua S.'s father, as he and Rachel B. were married at the time of conception. However, in January 2002, the Sheboygan County Circuit Court adjudicated Matthew S. as Joshua S.'s biological father.[3] On January 8, 2002, Matthew S. began serving a ten-year prison sentence for the child abuse of Joshua S.'s half-brother.

On March 7, 2003, the social worker in Joshua S.'s case filed a Termination of Parental Rights (TPR) petition in regard to Rachel B. and Matthew S., pursuant to Wis. Stat. § 48.415(2).[4] The petition stated the following:

> Because of Matthew [S.'s] long-term incarceration and his previous violent behavior towards Joshua's half-brother, and because of [Rachel B.'s] inability to meet the conditions of the court order for well over a year and her lack of progress, it appears unlikely that either parent will

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[3] On September 5, 2002, the circuit court granted the Sheboygan County's Department of Social Services petition to amend the CHIPS order to reflect the change in paternity.

[4] The social worker first filed a petition to terminate Matthew S.'s parental rights on March 20, 2002, pursuant to the child abuse section of the Children's Code, Wis. Stat. § 48.415(5)(a). This petition was dismissed on April 2, 2002, because Matthew S. still had appeals pending for his child abuse conviction.

> be able to meet the conditions for the safe return of [Joshua S.] to their home within a one year period of any fact-finding hearing in this matter.

The circuit court appointed an attorney for Rachel B. and then conducted the initial hearing on the petition on March 27, 2003. The attorney for Rachel B. denied the grounds for termination of her parental rights. At this hearing, Matthew S.'s attorney denied the grounds for termination, discussed the possibility of a separate trial, indicated that he was planning to file a motion for severance, and stated that he would waive the time limits if the motion was granted.

Since the TPR petition was contested, there was a need to set a fact-finding hearing, pursuant to Wis. Stat. § 48.422(2). The circuit court originally scheduled this hearing before a jury for April 29 and 30, 2003, which fell well within the 45-day time period required by § 48.422(2). In a letter dated April 3, 2003, the deputy district attorney requested that the hearing be rescheduled, as he had a TPR trial scheduled for April 30 in another branch of the court. Matthew S.'s attorney also sent a letter to the court asking it to adjourn the hearing, as he would not be able to obtain a hearing date on a motion for severance before April 29 and 30. He also stated that he had scheduling conflicts on April 29.

Pursuant to these requests, the court notified the parties on April 4, 2003, that the fact-finding hearing was rescheduled for June 17 and 18, 2003. None of these actions occurred in open court or during a telephone conference on the record. On April 15, 2003, Matthew S. moved for severance of respondents, and thus for separate trials. The court scheduled a hearing for this motion on May 19, 2003. After these hearings were scheduled, Rachel

B.'s attorney indicated that he had a conflict with the case and could no longer continue as her attorney. On April 23, 2003, a new attorney was appointed to represent Rachel B. Soon after his appointment, Rachel B.'s new attorney indicated that he had a scheduling conflict with the motion for severance hearing on May 19, and also asked for a rescheduling of the June 17 and 18 fact-finding hearing. With the court's permission, Rachel B.'s attorney participated in the May 19 motion hearing via telephone. At that hearing, the circuit court, John D. Murphy, Judge, denied Matthew S.'s motion for severance. The court referred counsel to the court clerk to schedule the fact-finding hearing before a jury. On June 4, 2003, the court notified the parties that the fact-finding hearing was rescheduled for November 18 and 19, 2003.

On June 12, 2003, the deputy district attorney moved the court for a new hearing date, expressing concern about the 45-day constraints set forth in Wis. Stat. § 48.422(2). The circuit court heard and granted this motion on June 27, 2003, and moved the dates for the fact-finding hearing to August 7 and 8, 2003. Rachel B.'s attorney informed the court that he would be unavailable to represent her on those dates, and was later unsuccessful in finding a replacement. As a result, the court apparently took the fact-finding hearing off the calendar and scheduled a status conference for July 30, 2003.

While no record was made of that status conference, it appears that the court held another status conference on August 7, 2003, and rescheduled the fact-finding hearing for September 17, 2003. Prior to that hearing date, Judge Thomas S. Williams was substituted in place of Judge Terence J. Bourke, and a new attorney was appointed for Rachel B.

In accord with a conference call on August 28, 2003, the court held a motion hearing on September 12, 2003, to address various motions. The court granted severance of Matthew S.'s fact-finding hearing from Rachel B.'s. Although another formal motion was not made to that effect, all of the parties agreed to severance, and the circuit court accepted the stipulation.

Matthew S.'s fact-finding hearing was then scheduled for September 17, 2003. At his hearing, all four special verdict questions were answered in the affirmative, thus indicating, among other things, that he would not be able to meet the CHIPS conditions within the 12-month period after the hearing. Rachel B.'s fact-finding hearing was postponed until October 15, 16, and 17, 2003. At her hearing, all four special verdict questions were also answered in the affirmative.[5]

On October 30, 2003, the circuit court entered a dispositional order terminating the parental rights of both

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[5] The four special verdict questions were as follows:

1. Has [Joshua S.] been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

2. Did the Sheboygan County Department of Social Services make a reasonable effort to provide the services to assist [Rachel B.] in meeting the conditions for the return of the child?

3. Has [Rachel B.] failed to meet the conditions for the safe return of [Joshua S.] to her home?

4. Is there a substantial likelihood that [Rachel B.] will not meet these conditions within the twelve-month period following the conclusion of this hearing?

Matthew S. and Rachel B., pursuant to these jury verdicts. The record does not indicate that either the parents or Sheboygan County or the guardian ad litem raised the issue regarding the circuit court's competency to hear the cases. Both Matthew S. and Rachel B. timely appealed.

On appeal, Rachel B. argued that, pursuant to Wis. Stat. § 48.422(2), the circuit court lost competency to proceed with her case on May 12, 2003, 45 days after the initial hearing on the termination petition. Because her fact-finding hearing did not occur until October 15, 16, and 17, 2003, she claimed that the court did not have competency to order the termination of her parental rights. In an unpublished opinion, the court of appeals affirmed the termination of her parental rights on August 25, 2004. Court of appeals Judge Richard S. Brown, relying on *Village of Trempealeau v. Mikrut,* held that Rachel waived her claim by not raising it before the circuit court. The court extended the holding in *Mikrut* to competency challenges based on the violation of the statutory time constraints at issue. As a result, the court of appeals affirmed the order of the circuit court terminating Rachel B.'s parental rights to Joshua S.

Rachel petitioned this court to review the decision of the court of appeals, and we granted her petition and now reverse.

II

The issue we address is whether a competency challenge based on the violation of the statutory time limitation of Wis. Stat. § 48.422(2) of the Children's Code is waived, even though it was not raised in circuit court. This presents a question of law. We therefore review this

question de novo, benefiting from the analyses of the circuit court and court of appeals. *See Mikrut,* 2004 WI 79, 273 Wis. 2d 76, ¶ 7, 681 N.W.2d 190; *State v. Kywanda F.,* 200 Wis. 2d 26, 32-33, 546 N.W.2d 440 (1996).

Competency has been defined as the court's power to exercise subject matter jurisdiction. *Kohler Co. v. Wixen,* 204 Wis. 2d 327, 337, 555 N.W.2d 640 (Ct. App. 1996). The concept of competency is narrower than that of subject matter jurisdiction, because while the constitution confers subject matter jurisdiction on the courts, the state legislature may limit the ability of the courts to exercise that power by statute. *See* Wis. Const. art. VII, § 8; Wis. Stat. § 801.04. "Such a legislative enactment affects that court's competency to proceed rather than its subject matter jurisdiction." *Cepukenas v. Cepukenas,* 221 Wis. 2d 166, 170, 584 N.W.2d 227 (Ct. App. 1998). Competency is of central importance in this case, since the "failure to comply with mandatory time limits under the Children's Code may result in the loss of the circuit court's competency to proceed." *State v. April O.,* 2000 WI App 70, ¶ 5, 233 Wis. 2d 663, 607 N.W.2d 927.

The legislative history of the Children's Code has been summarized previously by Wisconsin courts, so it is unnecessary that we provide great detail here. *In re B.J.N.,* 162 Wis. 2d 635, 645, 469 N.W.2d 845 (1991); *see also In re R.H.,* 147 Wis. 2d 22, 433 N.W.2d 16 (Ct. App. 1988). However, we do highlight some important revisions, in order to clarify the legislative intent behind the statutory time limits at issue. When the Children's Code was first enacted, "there were 'no statutorily authorized time limits for the processing of cases in the juvenile court,' the lack of which often resulted in an abuse of detention." *B.J.N.,* 162 Wis. 2d at 646 (citing Wisconsin Council on Criminal

Justice, *Juvenile Justice Standards and Goals* 81 (Dec. 1975)). In 1977 and 1979, however, the Code was substantially revised to include numerous time limitations, which were established to protect constitutional due process rights. *B.J.N.*, 162 Wis. 2d at 646; *R.H.*, 147 Wis. 2d at 27-31. "The legislative history of the Children's Code shows that the legislature considers that strict time limits between critical stages within the adjudication process are necessary to protect the due process rights of children and parents." *R.H.*, 147 Wis. 2d at 33.

As stated above, the time limit in this case requires that a fact-finding hearing be held within 45 days of a party contesting the petition for termination of parental rights. Wis. Stat. § 48.422(2). While all time limits set forth in the Children's Code are intended to be mandatory, the legislature provided that noncompliance with the time limits may not always result in the loss of competency. *See April O.*, 2000 WI App. 70, 233 Wis. 2d 663, ¶ 5. Time limits under Wis. Stat. ch. 48 may be delayed, continued, or extended, pursuant to Wis. Stat. § 48.315.

Sheboygan County argues that here the application of Wis. Stat. § 48.315 extended the circuit court's competency to terminate Rachel B.'s parental rights. Specifically, it argues that the 45-day time limit mandated by Wis. Stat. § 48.422(2) was tolled by Matthew S.'s motion for severance, pursuant to § 48.315(1)(a). This statute reads:

> (1) The following time periods shall be excluded in computing time requirements within this chapter:
>
> (a) Any period of delay resulting from other legal actions concerning the child or the unborn child and the unborn child's expectant mother,

> including an examination under s. 48.295 or a hearing related to the mental condition of the child, the child's parent, guardian or legal custodian or the expectant mother, prehearing motions, waiver motions and hearings on other matters.

According to Sheboygan County, the effect of Matthew S.'s motion for severance, in light of this statute, was to toll the 45-day time limit for an additional 34 days, expanding the statutory deadline to June 13, 2003.

Sheboygan County also argues that the circuit court properly continued the case for good cause, pursuant to Wis. Stat. § 48.315(2). It contends that at the hearing on the motion for severance on May 19, 2003, the court noted on the record that there were scheduling conflicts and that the fact-finding hearing would need to be postponed. Sheboygan County argues that these scheduling conflicts constituted good cause, thus triggering a permitted continuance under § 48.315(2).

In opposition to this argument, Rachel B. claims that the court lost competency when it violated the time limitation set forth in Wis. Stat. § 48.422(2), and that this deadline was never properly continued nor the time period tolled. In response to Sheboygan County's first argument, that Matthew S.'s motion for severance tolled the statute, Rachel B. contends that the filing of this motion had no effect on the violation of the mandatory time limit. In Wis. Stat. § 48.315(1)(a), the statute excludes "any period of delay resulting from other legal actions concerning the child" when computing time requirements within the Children's Code. Rachel B. argues that because the motion for severance was not filed until after the court had already extended the time for the fact-finding hearing, the

period of delay could not be "resulting from" Matthew S.'s motion.

We agree with Rachel B. that Matthew S.'s motion for severance did not toll the statutory time limit set forth in Wis. Stat. § 48.422(2). Because the initial appearance was held for both Rachel B. and Matthew S. on March 27, 2003, and the petition was contested at that time, the statutory deadline for the fact-finding hearing was May 12, 2003. However, on April 3, 2003, the court rescheduled the fact-finding hearing to June 18, 2003. Matthew S. did not file his motion for severance until April 15, 2003, after the fact-finding hearing had already been rescheduled. As a result, the delay in the fact-finding hearing did not result from the filing of the severance motion.[6] Because the motion for severance was filed after the fact-finding hearing was already rescheduled, Sheboygan County's argument is not persuasive.[7]

In response to Sheboygan County's second argument, Rachel B. contends that there never was a continuance of the fact-finding hearing, in accord with Wis. Stat.

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[6] It should also be noted that the attorney for Matthew S. was directed at the March 27 hearing to make his motion for severance within the 45-day time limit. Judge Murphy stated: "We have 45 days to do this. Make your motion."

[7] Even if we agreed with Sheboygan County that the statute was properly tolled, the statutory time limit was still violated, and the court lost competency to proceed. Matthew S.'s motion for severance, if it tolled the statute, would have extended the time to hold the fact-finding hearing by 34 days, to June 13, 2003. Thirty-four days was the amount of time that elapsed between the filing of the motion on April 15, 2003, and the date of the motion hearing, May 19, 2003. Regardless, the record indicates that Rachel B.'s fact-finding hearing did not commence until October 15, 2003. This date falls well outside the 45-day time limit mandated by Wis. Stat. § 48.422(2).

§ 48.315(2). She argues that the circuit court failed to acknowledge in open court or in a telephone conference on the record that the hearing was continued for good cause, as is required by the statute. She also relies on the court of appeals' decision in *April O.* In *April O.*, the parents argued on appeal that the circuit court did not have competency to terminate their parental rights, since the circuit court failed to hold their initial and dispositional hearings within the mandatory time limits set forth in Wis. Stat. §§ 48.422 and 48.424(4) (1997-98). *April O.*, 2000 WI App. 70, 233 Wis. 2d 663, ¶ 5. In that case, the circuit court determined on the record that good cause existed to extend the time limits, pursuant to Wis. Stat. § 48.315(2), but it did so only after the time limits had already expired. The court of appeals therefore concluded that "once a court has lost competency it cannot, in a later proceeding, find good cause for a delay and thereby restore competency." *Id.*, ¶ 10. Accordingly, the court of appeals determined that the circuit court had lost competency to proceed and vacated the termination order of the circuit court.

We agree with Rachel B. that the there was no determination of good cause in open court or during a telephone conference on the record. In this case, similar to *April O.*, the circuit court did not make a finding of good cause during the March 27, 2003 hearing. When the fact-finding hearing was rescheduled for the first time on April 4, 2003, and set for June 17, 2003, that date was outside of the statutorily required 45 days. The court notified the parties by letter, without a showing of good cause in open court or during a phone conference on the record. On March 27, 2003, the only mention of a potential scheduling problem was when Matthew S.'s attorney raised the possibility of

severance, and the circuit court noted that the fact-finding hearing had to be held within 45 days. Therefore, when the time limit expired without a continuance in accord with Wis. Stat. § 48.315(2), the circuit court lost competency to proceed. In other words, "the circuit court never granted a continuance at any proceeding before the time limits expired and therefore did not do so in open court and in a 'timely manner.'" *April O.*, 2000 WI Apop 70, 33 Wis. 2d 663, ¶ 10.[8] Accordingly, Sheboygan County's arguments to extend the competency of the court, pursuant to Wis. Stat. § 48.315(2), fails.

Sheboygan County next argues that the court of appeals correctly applied *Village of Trempealeau v. Mikrut* in determining that a challenge to a circuit court's competency is waived if not raised in the circuit court. In *Mikrut,* the defendant was adjudged guilty of 21 violations of local ordinances. On appeal, he argued that defects in the issuance of these citations caused the circuit court to lack competency, and that the judgments against him thus were void. *Mikrut,* 2004 WI 79, 273 Wis. 2d 76, ¶ 6, 681 N.W.2d 190. This court held that competency does not equate to subject matter jurisdiction, and that such a

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[8] We do not decide whether the scheduling conflicts, noted on the record at later hearings, would have constituted good cause for a continuance. Such a determination distinguishes this case from *State v. Quinsanna D.*, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752, and other cases where scheduling conflicts were discussed on the record, within the statutory time limit.

We also recognize that on February 9, 2005, this court granted a petition for review in *State v. Robert K.*, 2004AP2330, 2005 WI 21; 278 Wis.2d 535; 693 N.W.2d 75 (2005) consolidated with 2004AP2331. That case similarly involved a competency challenge based on a violation of Wis. Stat. § 48.422(2). That case is somewhat different than the one at issue here.

challenge to the circuit court's competency is waived if not raised in the circuit court. *Id.*, ¶ 3. "The *Mikrut* court, however, backed off from adopting a categorical rule that all competency objections must be made at circuit court or be waived." *State v. Michael S.*, 2005 WI 82, ¶ 71, 282 Wis. 2d 1, 698 N.W.2d 673 (citing *Mikrut*, 2004 WI 79, 273 Wis. 2d 76, ¶ 30, 681 N.W.2d 190).

Rachel B., on the other hand, argues that the court of appeals misinterpreted the holding in *Mikrut* and improperly extended the waiver rule. She contends that this issue should be controlled by our decision in *B.J.N.* In that case, a petition was filed to extend a dispositional order beyond the 30-day extension allowed by Wis. Stat. § 48.365(6) (1987-88). *B.J.N.*, 162 Wis. 2d at 643. This court held that such an extension was not proper and, with regard to the issue of waiver, concluded that "a party cannot waive the right to object to a court's loss of competence once the 30-day extension has passed without a hearing." *Id.* at 658. In so holding, the court emphasized that "an objecting party's failure to expressly raise the loss of competence at the earliest available moment cannot revive an order which has expired and no longer carries any force of law." *Id.* Rachel B. argues that this reasoning should be applied to similar mandatory statutory time limits within the Children's Code, such as the 45-day deadline set forth in Wis. Stat. § 48.422(2).

In our analysis of the waiver rule, we recognize that the *Mikrut* court did not address whether mandatory statutory time limitations can be waived. In that case, this court stated:

> [T]here is an established line of cases holding, in conclusory fashion, that competency challenges premised upon noncompliance with mandatory

> statutory time limitations cannot be waived. Because the competency challenge in this case is not premised upon noncompliance with statutory time limitations, we do not address the issue of waiver in this context except to note that these cases appear to simply perpetuate by rote the rule in older case law that statutory time limitations are "jurisdictional" and therefore cannot be waived.

Mikrut, 2004 WI 79, 273 Wis. 2d 76, ¶ 3 n.1, 681 N.W.2d 190 (citation omitted).

Although we acknowledged in *Mikrut* that there was case law holding that mandatory statutory time limitations under Wis. Stat. ch. 48 cannot be waived, we noted some concern with the continued viability of such case law. *Mikrut,* 2004 WI 79, 273 Wis. 2d 76, ¶ 12 n.4, 681 N.W.2d 190. Pursuant to this concern, the *Mikrut* court highlighted recent legislation, particularly Wis. Stat. § 48.315(2m)(b). This amendment to § 48.315, discussed in *Mikrut,* specifies that "failure to comply with time limits specified in par. (a) does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction." Wis. Stat. § 48.315(2m)(b).

The court of appeals interpreted *Mikrut* as controlling the case before us. Relying on *Mikrut,* the court of appeals held that Rachel B.'s competency challenge came too late, because it was not raised in the circuit court. *Sheboygan County v. Matthew S.,* No. 2004AP901, 2004 WI App 186, ¶ 25; 276 Wis. 2d 572; 687 N.W.2d 550, ¶ 25 (2004). The court's rationale for extending *Mikrut* was as follows:

> *Mikrut* purported not to extend its holding to competency challenges based on violations of mandatory statutory time limitations, which

> were not at issue in that case. However, the sweeping language of that holding convinces us that the court would do so in a case where the issue was properly raised. Because we therefore conclude that it meant to sub silentio overrule all cases necessitating a contrary result, this court cannot in good conscience decline to follow *Mikrut* in this case.

Id., ¶ 25 (footnotes omitted).

We agree with Rachel B. that the waiver rule adopted in *Mikrut* does not extend to this case. In *Mikrut,* we declined to overrule *B.J.N.* or its progeny, and specifically refrained from extending our holding to cases involving competency challenges based on violations of statutory time limitations. *See Mikrut,* 2004 WI 79, 273 Wis. 2d 76, ¶ 3 n.1, 681 N.W.2d 190. "Thus, the waiver rule of *Mikrut* does not, according to *Mikrut,* control the outcome of this case. The present case involves a statutory time period that *Mikrut* left undisturbed." *Michael S.,* 2005 WI 82, ¶ 73, 282 Wis. 2d 1, 698 N.W.2d 673. We therefore conclude, consistent with *Michael S., Mikrut,* and *B.J.N.,* that a competency challenge such as the one here, based on the court's failure to act within the statutory time periods listed within Wis. Stat. ch. 48, cannot be waived, even though it was not raised in the circuit court.

We also conclude that recent changes to the Children's Code do not affect our decision in this case, nor did the changes overrule *B.J.N.* and *April O.* sub silentio. Both the court of appeals and Sheboygan County noted that since those cases were decided, the Wisconsin Legislature has amended Wis. Stat. § 48.315 to specify that the "failure to comply with time limitations for continuances, extensions of time or periods of delay in Ch. 48 'does not

deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction. . . .'" *See Mikrut*, 2004 WI 79, 273 Wis. 2d 76, ¶ 12 n.4, 681 N.W.2d 190; Wis. Stat. § 48.315(2m)(b). In doing so, Sheboygan County contends that the legislature clearly intended to afford competency to courts after violations of any time limit within Wis. Stat. ch. 48.

Rachel B., on the other hand, argues that the court of appeals did not properly interpret and apply the recent amendment to Wis. Stat. § 48.315 and its effect on competency. She contends that because *Mikrut* omitted language from the statutory text, that the court of appeals inappropriately broadened the scope of the statute. We agree. The *Mikrut* court left out the first line of § 48.315(2m)(b) when it discussed the new legislation and its effect on competency. The first line of the statutory language in subsection (2m)(b) is as follows: "Failure to comply with any time limit specified in par. (a). . . ." Wis. Stat. § 48.315(2m)(a) (emphasis added). Thus, only a failure to comply with the time limits in subsection (2m)(a)1. and 2. will trigger the application of subsection (2m)(b), and thus save the court's personal or subject matter jurisdiction or competency to exercise that jurisdiction.

The text of Wis. Stat. § 48.315(2m)(a) does not mention the mandatory statutory time limit presented in this case. Here, the time limit in question is the 45-day period between the March 27 date, where the petition for termination of parental rights was contested, and the date that the fact-finding hearing was to be held. In contrast, Wis. Stat. § 48.315(2m)(a) only applies to the following:

> No continuance or extension of a time limit specified in this chapter may be granted and no period of delay specified in sub. (1) may be excluded in

> computing a time requirement under this chapter if the continuance, extension, or exclusion would result in any of the following:
>
> 1. The court making an initial finding under s. 48.21(5)(b)1., 48.355(2)(b)(6)., or 48.357(2v)(a)1. that reasonable efforts have been made to prevent the removal of the child from the home, while assuring that the child's health and safety are the paramount concerns, or an initial finding under s. 48.21(5)(b)3., 48.355(2)(b)6r., or 48.357(2v)(a)3. that those efforts were not required to be made because a circumstance specified in s. 48.355(2d)(b)1. to 5. applies, more than 60 days after the date on which the child was removed from the home.
>
> 2. The court making an initial finding under s. 48.38(5m) that the agency primarily responsible for providing services to the child has made reasonable efforts to achieve the goals of the child's permanency plan more than 12 months after the date on which the child was removed from the home or making any subsequent findings under s. 48.38(5m) as to those reasonable efforts more than 12 months after the date of a previous finding as to those reasonable efforts.

Therefore, without any express language incorporating Wis. Stat. § 48.422(2) into subsection (a) of Wis. Stat. § 48.315(2m), subsection (b) of the same statute is not triggered, and thus it is inapplicable to the competency challenge in this case. Moreover, this recent amendment to the Children's Code does not affect our reliance on either *B.J.N.* or *April O.* Neither of those cases involved circumstances that would trigger § 48.315(2m)(b). Section 48.315(2) was correctly applied in those cases, and the decisions finding a loss of competency would not have been changed even if this amendment had been in effect.

We are convinced by the plain reading of the statute that the legislature did not intend to extend competency for all violations of time deadlines outlined in the Children's Code. If this were truly its intent, it would have said as much in the statute. *See State ex rel. Kalal v. Circuit Court,* 2004 WI 58, ¶¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110. Although we interpret the statute as unambiguous, our conclusion is bolstered when we contrast the language of Wis. Stat. § 48.315(2m) with that of Wis. Stat. § 938.315(3) of the Juvenile Justice Code.[9] In the latter statute, the legislature stated: "Failure to comply with *any* time limit specified in *this chapter* does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction." Wis. Stat. § 938.315(3) (emphasis added).

While Wis. Stat. § 48.315(2m)(b) uses much of the same language as Wis. Stat. § 938.315(3), it did not save competency for a violation of "any time limit specified in this chapter. . . ." Wis. Stat. § 938.315(3).[10] Instead, it limited the statute's scope to "any time limit specified in

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[9] The original Children's Code encompassed a broad array of juvenile matters, including TPR petitions, adoptions, and delinquency petitions. However, "in 1995, the legislature created chapter 938, the Juvenile Justice Code, which governs delinquent juveniles; CHIPS cases remain in chapter 48." *State v. Michael S.,* 2005 WI 82, ¶ 57, 282 Wis. 2d 1, 698 N.W.2d 673 (interpreting time limits under Wis. Stat. § 938.315).

[10] While we acknowledge that the *Mikrut* court held that Wis. Stat. § 48.315(2m) was amended "to like effect" as Wis. Stat. § 938.315, we clarify now that the two statutes are not identical in effect. In § 938.315, the statute saves court competency for the failure to comply with any time limit specified in that entire chapter. In § 48.315(2), however, court competency is only saved for the failure to comply with any time limit specified in paragraph (a) of that statute, not the entire chapter.

par. (a)." It is also important to note that § 48.315(2m)(b) became effective several years after the legislature adopted the Juvenile Justice Code in 1995. Therefore, it is reasonable to conclude that the legislature considered, and then rejected, the adoption of the exact language that was used in § 938.315(3).

Because of the clear statutory language and legislative intent behind these statutes, we must emphasize the importance of strictly following the provisions of Wis. Stat. ch. 48. While we recognize the need for flexibility in the Children's Code, we believe the legislature addressed this problem with the enactment of Wis. Stat. § 48.315. In this case, for example, the court perhaps could have granted a continuance if it had recognized good cause for the delay in open court or during a telephone conference on the record. Without such action, however, there is no choice for us but to follow the plain language of the statutes, and to hold that the court lost competency to proceed before it ordered the termination of Rachel B.'s parental rights. In a similar situation in *April O.*, the court of appeals understandingly lamented:

> (Statutory language) compels us to reach a result in this case that is, to say the least, unfortunate. . . . The object of the Children's Code is to protect the best interests of the children. . . . We empathize with the circuit court that this is not a good result for the children. However, we may not rewrite clear statutory language. . . .

April O., 2004 WI App 70, 233 Wis. 2d 663, ¶ 12 We are satisfied, however, that children such as Joshua S., and their parents, clearly have a due process right to have these decisions determined within the time limits set by the legislature, unless statutory provisions for a

continuance are followed. *See B.J.N.*, 162 Wis. 2d at 649; *R.H.*, 147 Wis. 2d at 33.

III

In sum, we conclude that a competency challenge based on the violation of the statutory time limitation of Wis. Stat. § 48.422(2) cannot be waived, even though it was not raised in the circuit court. The court of appeals erred in extending the holding in *Mikrut* to violations of such a mandatory statutory time limitation under Wis. Stat. ch. 48. The circuit court did not hold the fact-finding hearing within the time limits established by § 48.422(2), and never granted a proper extension or continuance pursuant to Wis. Stat. §§ 48.315(1)(a) and (2), and thus it lost competency to proceed before it ordered the termination of Rachel B.'s parental rights. Accordingly, we reverse the decision of the court of appeals, which had affirmed the order of the circuit court.

By the Court. – The decision of the court of appeals is reversed.

DISSENT BY: JON P. WILCOX

DISSENT:

JON P. WILCOX, J. (*dissenting*). Wisconsin Stat. § 48.01(1) (2003-04)[11] provides: "In construing this chapter, the best interests of the child or unborn child shall always be of paramount consideration." Because the majority adopts an interpretation of Wis. Stat. § 48.315(2m)(b) that

[11] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise indicated.

is inconsistent with the text of the statute and in contravention of the best interests of children, I dissent.

Section 48.315(2m)(b) provides, in pertinent part: "Failure to comply with any time limit specified in par. (a) does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction." Wisconsin Stat. § 48.315(2m)(a) governs the granting of a continuance or extension "of *a time limit specified in this chapter*. . . ." (Emphasis added.)

Thus, this court was correct in *Village of Trempealeau v. Mikrut,* 2004 WI 79, ¶ 12 n.4, 273 Wis. 2d 76, 681 N.W.2d 190, when we stated that § 48.315(2m)(b) "specifies that failure to comply with time limitations for continuances, extensions of time or periods of delay in Ch. 48 'does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction.'" Given that § 48.315(2m)(a) applies to granting continuances or extensions "of a time limit specified in this chapter," *Mikrut* was correct in stating that § 48.315(2m)(b) is similar to Wis. Stat. § 938.315(3), in that both apply to any time period in the respective chapter. *Id.*

The majority erroneously concludes that the operation of § 48.315(2m)(b) is limited to those time periods specified in subdivisions 1.-2. of § 48.315(2m)(a). Majority op., ¶ 32. Contrary to the assertion of the majority, the statute says no such thing. While § 48.315(2m)(a) provides that a court may not grant a continuance or extension if the continuance or extension would result in certain other time limits specified in subdivisions 1.-2. being violated, the application of § 48.315(2m)(b) is not limited to those time periods enumerated in subdivisions 1.-2. of § 48.315(2m)(a). Rather, the text of § 48.315(2m)(b) expressly applies to "any time

limit specified in par. (a)." As paragraph (a) governs the granting of continuances and extensions "of a time limit specified in this chapter[,]" it is of no consequence that paragraph (a) "does not mention the mandatory time limit presented in this case." Majority op., ¶ 33.

In addition to being inconsistent with the text of the statute, the majority's interpretation of § 48.315(2m)(b) fails to adhere to the legislative mandate that in construing all provisions of chapter 48, "the best interests of the child or unborn child shall always be of paramount consideration." Wisconsin Stat. § 48.01(1). The time period at issue in this case, Wis. Stat. § 48.422(2), was not met in large part due to scheduling conflicts between the parties' attorneys. *See* majority op., ¶¶ 6-7. The majority fails to explain how interpreting § 48.315(2m)(b) in such a manner so as to deprive a circuit court of its competency to adjudicate the termination of parental rights (TPR) petition under these circumstances is in the best interests of Joshua S. The interests of children, such as Joshua S., are best protected by interpreting § 48.315(2m)(a) & (b) in conformity with their plain language so as to allow a circuit court to retain competency over the TPR petition if a time period within chapter 48 has not been met.

Accordingly, I would hold that pursuant to § 48.315(2m)(a) & (b), a circuit court does not lose competency when it fails to comply with the time period set forth in § 48.422(2). This interpretation conforms to the plain statutory language and the best interests of the child sought to be protected by the TPR petition. Therefore, I would affirm the order of the circuit court.

I am authorized to state that Justices DAVID T. PROSSER and PATIENCE DRAKE ROGGENSACK join in this dissent.

State of Wisconsin, Circuit Court, Sheboygan County	*For Official Use*
In the Interest Of Joshua S Name 10-10-2001 Date of Birth	**Order Concerning Termination of Parental Rights (Involuntary)** Case No. 2003 TP 9	

THE COURT FINDS:

1. Notice has been given to all those entitled to notice.

2. The provisions of the Indian Child Welfare Act
   ☒ do not apply ☐ have been followed

3. The parent(s) are:

   ☒ a. Mother's name: Rachel
   Date of birth: 08-08-76

   ☒ b. Father's name: Matthew
   Date of birth: 01-23-79

   ☐ c. Other possible father(s):
   Name: _____
   Date of birth: _____

   Name: _____
   Date of birth: _____

   Name: _____
   Date of birth: _____

☐ 4. There has been no declaration of paternal interest.

☐ 5. (Name(s): _____
failed to appear at the hearing, and is/are in default.

6. This matter was tried to ☒ a jury ☐ the court and the following grounds for termination of the parental rights of Rachel and Matthew were found to exist:

Mother	Father	
☐	☐	abandonment
☐	☐	relinquishment
☒	☒	continuing need of protection or services
☐	☐	continuing parental disability
☐	☐	continuing denial of periods of physical placement or visitation
☐	☐	child abuse
☐	☐	failure to assume parental responsibility
☐	☐	incestuous parenthood
☐	☐	homicide or solicitation to commit homicide of parent
☐	☐	parenthood as a result of sexual assault
☐	☐	commission of a serious felony against one of the person's children prior involuntary termination of parental rights to another child

☒ 7. The ☒ mother ☒ father is unfit.

8. It is in the best interest of the child that the parental rights of the ☒ mother ☒ father(s) be terminated after considering the following factors:

- The likelihood of the child's adoption after termination.
- The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

- Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- The wishes of the child.
- The duration of the separation of the parent from the child.
- Whether the child will be able to enter into a more stable and permanently family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

9. The child is placed in sustaining care because:

☐ the child is not likely to be adopted.

☐ adoption is not in the best interest of the child.

10. *(Complete one of the following only if there is a permanency plan.)*

Reasonable efforts to achieve the goal(s) of the permanency plan were:

☒ made by the department or agency responsible for providing services in the following manner: the department attempted to provide counseling, assistance in obtaining employment, and case management services.

☐ not made by the department or agency responsible for providing services.

11. The court has informed the birth parent(s) of rights under §§48.432, 48.433 and 48.434, Wisconsin Statutes.

☒ 12. Other: the Court finds that it is contrary to the best interest of the child for the child to remain in

the home of the parents and that reasonable efforts have been made to return the child to the home of the parents.

☐ 13. The evidence does not warrant the termination of the parental rights of (name): _____

THE COURT ORDERS:

☒ 1a. The parental rights of Rachel and Matthew (Name of Parent(s) is/are terminated.

Guardianship and custody of the child:

☐ remain with the parent whose rights have not been terminated.

☒ are transferred pending adoption to: the State of Wisconsin, Department of Health and Family Services.

☐ Other: _____

If guardianship or custody is transferred to an agency, this agency shall be responsible for securing the adoption of the child or establishing the child in a permanent family setting. The child's permanency plan:

☒ has been filed ☐ is attached
☐ will be filed within 60 days

☐ 1b. The petition to terminate parental rights of (name) _____ is dismissed.

☒ 2. Other: for purposes of foster care funding, this order is effective October 30, 2003.

BY THE COURT:

/s/ Thomas S. Williams
Circuit Court Judge

The Honorable Thomas S. Williams, Reserve Judge
Name Printed or Typed

October 30, 2003
Date

In re the Termination of Parental Rights to Joshua S., a Person Under the Age of 18: Sheboygan County Department of Social Services, Petitioner-Respondent, v. Matthew S., Respondent-Co-Appellant, Rachel B., Respondent-Appellant.

Appeal No. 04-0901

COURT OF APPEALS OF WISCONSIN, DISTRICT TWO

2004 WI App 186; 276 Wis. 2d 572; 687 N.W.2d 550; 2004 Wisc. App. LEXIS 685

August 25, 2004, Decided
August 25, 2004, Filed

JUDGES: BROWN, J.

OPINION BY: BROWN

OPINION:

BROWN, J.[1]

The circuit court terminated the parental rights of Matthew S. and Rachel B. to Joshua S. after a jury found that neither parent would be able to meet the conditions of return within a twelve-month period. Both Matthew and Rachel appeal. Matthew claims that the trial court should have allowed him to demonstrate his counsel's ineffectiveness by questioning counsel about why he never objected that one of the conditions violated Matthew's ***Miranda***[2]

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[1] This appeal is decided by one judge pursuant to Wis. Stat. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] ***Miranda v. Arizona***, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

rights. This condition required Matthew to accept responsibility for abusing another child while Matthew's appeal from his conviction for that offense was still pending. He also claims his counsel was ineffective for not seeking placement of Joshua with Matthew's parents as an alternative to termination. Finally, he claims the jury did not hear enough evidence to find that the Sheboygan County Department of Social Services made reasonable efforts to help him comply with his conditions. Rachel's claim is that the court improperly continued her fact-finding hearing past a forty-five day statutory deadline and that the error dooms the termination proceeding. We reject all issues. Both the ***Miranda*** and the forty-five day arguments are waived, the theoretical placement with Matthew's parents would not have eliminated the trial court's concern that nonadoptive placements could not offer Joshua the stability of a permanent home, and the evidence supported the conclusion that the Department provided the best services it could under the circumstances. We affirm.

Joshua was born on October 10, 2001, to Rachel. On November 30, the circuit court found Joshua to be a child in need of protection or services, pursuant to Wis. Stat. § 48.13(3m) and (10) and ordered him placed in a foster home. The CHIPS order imposed numerous conditions on Rachel and her husband, Ronald B., for Joshua's return, presuming Ronald to be Joshua's father. However, on January 8, 2002, it adjudicated Matthew the father. On September 5, 2002, an order of the circuit court granted the Department's petition to amend the CHIPS order to reflect the change in paternity.

On January 8, 2002, the same day the court adjudicated Matthew's paternity, he began to serve a ten-year jail sentence. This sentence arose out of a conviction,

currently the subject of a pending appeal, for the abuse of Joshua's half-brother, Christopher B. Therefore, he was already incarcerated when the circuit court amended the CHIPS order.

The revised CHIPS order imposed upon Matthew the following conditions:[3]

> 2. Matthew S[.] shall sign all Releases of Information to assist the worker in determining what services would be appropriate and to allow the social worker and the Court to monitor the terms and conditions of the Dispositional Order.
>
> 3. Matthew S[.] shall demonstrate that he can fulfill his right as a parent to protect, train, and discipline, provide food, shelter, legal services, education, and ordinary medical and dental care of his son, Joshua S[.]
>
> 4. Matthew S[.] is to have no contact, directly or indirectly with Rachel B[.]
>
> 5. Matthew S[.] is to have no contact with children under the age of 18, unless preauthorized by Joshua's social worker and Matthew S[.]'s social worker.
>
> 6. Matthew S[.] shall maintain employment during the pendency of the Court Order in order to demonstrate that he can perform his duties as a parent to Joshua.

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[3] Although this court would not ordinarily include a list of the conditions in a CHIPS order, in this case, many of the conditions are particularly significant to our conclusion that the Department made reasonable efforts to provide services to Matthew.

7. Matthew S[.] shall inform the social worker whom he has contacted for services.

8. Matthew S[.] shall inform the worker of any medications prescribed by a physician or psychiatrist. . .

. . .

10. Matthew S[.] shall accept full responsibility for his behavior and actions for the injuries of Christopher B[.], without blaming or minimizing his behavior.

11. Matthew S[.] is to cooperate with all programming and medications recommended by the Department of Corrections. . . Through anger management, Matthew S[.] must understand the barriers that prevent him from maintaining self-control and making rational decisions. He must develop an appropriate coping mechanism so as to remain sufficiently calm and stable when faced with stressful events.

12. Matthew S[.] shall follow all rules required of him during incarceration.

13. Matthew S[.] shall complete a parenting program. The parenting program needs to be preauthorized by the social worker. . . .

14. Matthew S[.] must be able to refrain from using physical discipline.

15. The parents shall cooperate with the Sheboygan County Child Support Agency in contributing toward the cost of their children's care. . .

On March 7, 2003, Martha Mittelstaedt, the social worker in Joshua's case, petitioned the court to terminate

both parents' parental rights, pursuant to Wis. Stat. § 48.415(2), which provides that a ground for termination exists when a child is in continuing need of protection or services. In support of that ground, the petition alleged that Joshua had been adjudged a child in need of protection and removed from the home by court order, and that the Department had made reasonable efforts to provide court-ordered services. It also explained how both parents had failed to meet the conditions of the CHIPS order and opined that based on Rachel's lack of progress over the preceding year and Matthew's previous violence and long-term incarceration, neither parent would be able to comply with those conditions within a twelve-month period following any fact-finding hearing.

Both parties denied the grounds for termination at the March 27 plea hearing, and the circuit court set April 29-30 as the dates for the fact-finding hearing. Due to several postponements requested by both parents and by the Department, however, the circuit court delayed Matthew's hearing until September 17 and Rachel's until October 15-17. At each, the jury returned a special verdict in favor of the Department.

The circuit court held a dispositional hearing and terminated the rights of both parents on October 30. With respect to the termination of Matthew's rights, the trial court observed that most of the conditions the CHIPS order imposed upon Matthew were impossible for him to meet.[4] It accorded great weight in making its decision to Joshua's need for a permanent home and the inability of foster care to meet that need.

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[4] Rachel B. does not contest the grounds for her termination.

> You really get down to the stability and permanency aspect. As we have heard today and most of us knew before, foster home placements aren't permanent. Adoption is a permanent arrangement. Both Ms. B[.] and Matthew S[.] agree that the shift from one foster home to another creates emotional problems. In my judgment, the stability given by the adoption process is important to Joshua.

At various points prior to and throughout these termination proceedings, Matthew's parents, Bud S. and Mary S., had expressed an interest in having Joshua placed with them. Although both Matthew and his parents had "a number of times" discussed with Matthew's trial counsel their interest in filing for guardianship, counsel refused to file such a motion, because he believed that doing so would be imprudent and unsuccessful.

Both parents appealed the circuit court's order, and this court granted Matthew's motion for remand and permission to file a postjudgment motion. At the resulting postjudgment hearing, the trial court heard Matthew's ***Machner***[5] claim that trial counsel was prejudicially ineffective for his failure to seek placement with Matthew's parents and his claim that the evidence was insufficient to show that the Department had made "reasonable efforts" to provide court-ordered services. It rejected both claims.

During the motion hearing, Matthew also attempted to demonstrate trial counsel's ineffectiveness by establishing his failure to object to Condition 10 in the CHIPS

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[5] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App.1979).

order, which would have required Matthew to incriminate himself during his pending appeal. The trial court excluded this line of questioning as irrelevant. We now reach the issues.

Matthew first contends that the trial court erred at the postjudgment hearing when it concluded that trial counsel's reasons for his failure to object to the self-incriminating condition in the CHIPS order were irrelevant to Matthew's ***Machner*** claim. We determine, based on Matthew's failure to raise the issue in his written motion for a new trial, that the trial court properly exercised its discretion to exclude this evidence.[6] This court reviews an evidentiary ruling under the erroneous exercise of discretion standard. *See* ***State v. Pharr***, 115 Wis. 2d 334, 340 N.W.2d 498, 501 (1983). We will not overturn such a ruling if the trial judge considered the pertinent facts, applied the proper law, and reached a reasonable conclusion. *See id.* As to the pertinent facts, the trial court concluded that the written motion did not raise trial counsel's nonobjection to Condition 10 as an independent ground supporting Matthew's ineffective assistance claim. The trial court stated, "There is essentially a listing of some of the conditions, but it's not part of the allegations of ineffectiveness."

We agree. Although the motion made an editorial comment that the condition "arguably infringed Matthew J.S.'s Fifth Amendment privilege against self-incrimination" and cited case support for that proposition, it only made

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[6] We also note that trial counsel's failure to object to a CHIPS order condition more properly supported an ineffectiveness claim with respect to the CHIPS proceeding, not the subsequent involuntary termination proceeding.

mention of Condition 10 in a brief factual discussion including some of the conditions in the CHIPS order. The motion made no link between ineffectiveness and any of the conditions it listed. Matthew's written motion for a new trial specifically raised only one argument related to trial counsel's ineffectiveness: his failure to seek placement of Joshua with his paternal grandparents.

Matthew next contends that his trial counsel provided ineffective assistance when he failed to seek placement of Joshua with his paternal grandparents. However, we do not agree that this failure prejudiced the termination proceeding. Parents in involuntary termination of parental rights cases have a statutory right to counsel, Wis. Stat. § 48.23(2), that includes the right to effective counsel. ***A.S. v. Dane County Dep't of Soc. Servs.***, 168 Wis. 2d 995, 485 N.W.2d 52, 55 (1992).

When we review a circuit court's resolution of a claim that counsel was ineffective, mixed questions of law and fact are at issue. ***State v. Johnson***, 153 Wis. 2d 121, 449 N.W.2d 845, 848 (1990). This court will not disturb the circuit court's factual findings unless the are clearly erroneous, but we review de novo whether counsel's performance was deficient and prejudicial, because those issues present questions of law. *Id.* Our supreme court has applied the two-part test of ***Strickland v. Washington***, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), to determine counsel's effectiveness in involuntary termination of parental rights proceedings. *See* ***A.S.***, 485 N.W.2d at 55. The defendant must first show that counsel's performance was deficient. ***Strickland***, 466 U.S. at 687. Second, the defendant must prove that counsel's deficient performance prejudiced his or her defense, which entails

showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, [one] whose result is reliable." *Id.* The defendant can meet this second requirement by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A defendant must meet both parts of the ***Strickland*** test to prevail. *Id.* at 687.

Matthew has failed to undermine our confidence in the outcome.[7] He acknowledges that the trial court greatly emphasized Joshua's need for a permanent home in deciding to terminate Matthew's parental rights. The record contains ample evidence that placing Joshua with his paternal grandparents would not have guaranteed him a long-term home. The court heard testimony at the dispositional hearing from Ann Fuenger, an employee of the Wisconsin State Department of Health and Human Services who has worked on special needs adoptions for the past twenty-nine years. Fuenger expressed reservations about placing Joshua with his grandparents, based on her impression that Bud and Mary were more interested in raising Joshua until his father got out of prison than in fulfilling the parental role themselves. Mittelstaedt gave similar testimony. She also articulated concerns that Bud and Mary might not be able to choose between Joshua and Matthew, based on an earlier conversation with them. Given this evidence, and common experience with the strength of familial loyalties, it is far

[7] Because he cannot meet the prejudice prong of ***Strickland v. Washington***, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), we need not consider whether counsel's performance was deficient.

from clear that Joshua would have remained in a permanent arrangement with his grandparents if, upon his release, Matthew came knocking on their door to reclaim him.

Even if the trial court accepted that Bud and Mary would not have been so inclined to bend to their son's desires, it expressed concern with foster care by its very nature. "As we have heard today and most of us knew before, foster home placements aren't permanent." A foster care placement with Joshua's paternal grandparents could promise the child only the inherent impermanence of foster care. By arguing that his counsel was ineffective for seeking a necessarily nonadoptive placement, Matthew actually champions more impermanency in Joshua's life, a condition the trial court expressly determined was contrary to the child's best interests.

Matthew lastly contends that the jury had insufficient evidence before it to answer affirmatively the special verdict question, "Did the Sheboygan County Department of Social Services make a reasonable effort to provide the services ordered by the court?"[6] We will not upset a jury verdict as long as credible evidence, viewed in the light most favorable to the verdict, supports the verdict. ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 280 N.W.2d 156, 162 (1979). This deference is especially important where the trial judge approves the verdict. *Id.* We are satisfied that a reasonable jury could have concluded that clear and convincing evidence existed to

[6] We note that Matthew never expressed dissatisfaction with the services he received before the termination proceeding. He could have sought modification of the CHIPS order.

support a finding of "reasonable effort." *Cf.* ***Steven V. v. Kelly H.***, 2004 WI 47, P4, 271 Wis.2d 1, 678 N.W.2d 856 (due process and Wis. Stat. § 48.31 require proof of grounds for termination by clear and convincing evidence). Wisconsin Stat. § 48.415(2)(a)2.a. defines "reasonable effort" as "an earnest and conscientious effort to take good faith steps to provide the services ordered by the court and takes into consideration the characteristics of the parent or child . . . the level of cooperation of the parent . . . and other relevant circumstances of the case."

Matthew relies primarily on testimony by Mittelstaedt that she had not made reasonable efforts to provide Matthew with services because of his incarceration. Certainly, the record contained such testimony. However, the deferential standard of review obligates us to search for evidence *sustaining* the verdict, even if other evidence supports a contrary finding. ***Meurer***, 280 N.W.2d at 162-63.

A wide range of evidence the jury heard could have sustained the verdict. First, Wis. Stat. § 48.415(2)(a)2.a. specifically mentions *court-ordered* services. The transcript of Matthew's hearing indicates that the only services the CHIPS order expressly ordered the Department to provide in Joshua's case were supervision and foster care for Joshua. It ordered no services for Matthew. Nevertheless, Mittelstaedt acknowledged an implicit obligation to help Matthew comply with the conditions the CHIPS order imposed upon him and testified to a variety of services she had provided him. "I have tried to keep you informed of all happenings in Joshua's life. I attempted to assist in having you receive information from the Clinic. I kept you informed of his circumcision, evaluation through Birth to Three Program, and his evaluation at Children's

Hospital by Hematology." The jurors could reasonably construe the updates about Joshua's health care and schooling as an attempt to keep Matthew involved, to the extent possible, in Joshua's education and medical care – issues Condition 3 addressed. The jury heard additional testimony that Mittelstaedt had responded to Matthew's request for information on parenting by forwarding information from a public health nurse, had informed Matthew's social worker at the Department of Corrections about the conditions in the CHIPS order, and had written Matthew several times to ask how he planned to comply with the CHIPS order, what services he had made himself available to through the DOC, and what he had learned from information he had received on parenting. These latter efforts were particularly relevant to assessing whether and to what extent Matthew required assistance in complying with Conditions 11 and 13, which required him to participate in anger management and parenting classes, respectively. Certainly, the record supported a determination of good faith.

The record also contains evidence that Matthew was far less than cooperative, another factor the jury could properly consider in deciding what efforts were "reasonable efforts." He failed even to comply with all the conditions that were entirely within his control. His own testimony revealed that he violated Condition 12, which required him to follow all correctional rules. He admitted to three conduct reports, one of which resulted in missing a visit with Joshua. Matthew also admitted that he was taking prescribed medications. Despite his obligation in Condition 8 to inform the Department about any such medications, Mittelstaedt related that he had never done so. A reasonable jury could even conclude that Matthew

went out of his way to frustrate the Department's efforts to help him. Mittelstaedt stated that he did not return her correspondence regarding his plans to comply with the CHIPS order, what services he availed himself of through the DOC, or what he learned from the parenting materials he received from other sources. This evidence supported an inference that the Department was willing to at least explore with Matthew various means of complying with the CHIPS conditions and that Matthew simply dropped the ball. It could not assess his progress or determine what additional needs he had when he refused to provide the social worker with even a starting point. Accordingly, it would be entirely reasonable for a fact finder to conclude that any further efforts would have been similarly rebuffed and that the Department's duty to make "reasonable efforts" did not require going through the motions.

Finally, the jury heard evidence about other relevant circumstances, particularly Matthew's incarceration, which greatly limited the assistance the Department could feasibly offer. Conditions 11 and 13 required Matthew to complete programs in anger management and parenting. No one disputes that the Department never offered Matthew such programming. However, Mittelstaedt testified that she had no influence over what programs the DOC makes available to inmates. Rational fact finders could easily determine that "reasonable efforts" imposed no duty on the Department to exceed its authority through unprofessional attempts to dictate to the DOC how to administer its own programs.

Additionally, Matthew's incarceration made compliance with many of the other CHIPS conditions impossible. Condition 3, for example, required Matthew to "demonstrate that he can fulfill his right as a parent to protect,

train, and discipline, provide food, shelter, legal services, education, and ordinary medical and dental care of his son." Condition 6 obligated him "to maintain employment . . . in order to demonstrate that he can perform his duties as a parent to Joshua." While in prison, Matthew could not provide his son with most of the care Condition 3 describes. Joshua could not live with Matthew, and no amount of Department assistance could make that happen. Similarly, the testimony reflected that Matthew's biweekly income of a few dollars from his prison employment and schooling could not demonstrate an ability to perform parental duties.

A rational fact finder was entitled to reject the proposition that the Department's efforts fell short of reasonableness just because the conditions imposed upon Matthew were impossible for him to satisfy. Our supreme court made clear in ***Ann M.M. v. Rob. S.***, 176 Wis. 2d 673, 500 N.W.2d 649 (1993), that the law does not recognize the opportunity to parent as a prerequisite to termination. Although ***Ann M.M.*** involved a different ground for termination, failure to assume parental responsibility pursuant to Wis. Stat. § 48.415(6), that ground is similar to § 48.415(2) at issue in this case. Subsection (6) is based on failure ever to assume parental responsibility, whereas subsec. (2) addresses situations in which the parent has failed to assume parental responsibilities as addressed by a CHIPS order and remains unlikely to meet those conditions within a twelve-month period. We read subsec. (2) to impose on the parent the same absolute duty to properly parent the child. Parents must *succeed* in meeting their obligations, whereas the Department needs only to make a concerted effort to facilitate that end. Its duties are therefore not coextensive with Matthew's duties. To hold otherwise

would require us to exempt incarcerated parents from even the most basic of parenting responsibilities. We acknowledge that such a holding would serve Matthew's best interests. The law, however, protects *Joshua's* best interests. It is mightily unfortunate for Matthew that his brutality toward one child precluded him from providing a loving home for his own son, but these circumstances were of his own making. He, not Joshua, must pay the tragic price for his actions.

Rachel also contests the dispositional order for terminating her parental rights to Joshua. She asserts that the circuit court was incompetent to proceed with her case when it made the order. Her plea hearing occurred on March 27, but the court held her fact-finding hearing on October 15, 16, and 17. Rachel claims that based on Wis. Stat. § 48.422(2), which requires the court to hold a fact-finding hearing within forty-five days of the plea hearing, the court lost competency on May 12. None of the extensions, she claims, satisfied the requirements of Wis. Stat. § 48.315(2).[9]

We hold that Rachel's claim comes too late, because she never raised the issue in the circuit court. Our supreme court decided ***Village of Trempealeau v. Mikrut***, 2004 WI 79, 273 Wis.2d 76, 681 N.W.2d 190, last term. It held that "because competency does not equate to subject

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[9] It is well established that the time limits in Wis. Stat. § 48.422(2) are mandatory and that only compliance with Wis. Stat. § 48.315 will result in a valid delay, extension, or continuance. *See Waukesha County v. Darlene R.*, 201 Wis.2d 633, 549 N.W.2d 489, 492 (Ct.App.1996) (time limits in the Children's Code are mandatory). If the court grants an extension without adhering to the requirements of § 48.315(2), it will lose competence to proceed. *See State v. April O.*, 2000 WI App 70, ¶ 5, n. 4, 233 Wis.2d 663, 607 N.W.2d 927.

matter jurisdiction, a challenge to the circuit court's competency is waived if not raised in the circuit court." *Id.*, P3 ***Mikrut*** purported not to extend its holding to competency challenges based on violations of mandatory statutory time limitations, which were not at issue in that case.[10] However, the sweeping language of that holding convinces us that the court would do so in a case where the issue was properly raised. Because we therefore conclude that it meant to sub silentio overrule all cases necessitating a contrary result, this court cannot in good conscience decline to follow ***Mikrut*** in this case.[11]

We conclude that the circuit court properly terminated the parental rights of both Matthew and Rachel. The circuit court was well within its discretion when it concluded from Matthew's written motion that trial counsel's rationale for omitting to object to the "arguably illegal" CHIPS condition was irrelevant. Matthew also cannot claim his counsel was ineffective for not seeking placement of Joshua with his parents, because that omission in no way prejudiced him. Finally, Matthew's insufficient evidence

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[10] "Because the competency challenge in this case is not premised upon noncompliance with statutory time limitations, we do not address the issue of waiver in this context except to note that these cases appear to simply perpetuate by rote the rule in older case law that statutory time limitations are 'jurisdictional' and therefore cannot be waived." ***Village of Trempealeau v. Mikrut***, 24 W.I. 79, 273 Wis.2d 76, 681 N.W.2d 190, ¶ 3, n. 1.

[11] We note, however, that if ***Mikrut*** did not apply, Rachel's claim would probably be proper. In ***April O.***, the parents, like Rachel, neglected to object to improper delays. Moreover, both had actually sought many of these postponements. *See* ***April O.***, 233 Wis. 2d 663, 607 N.W.2d 927, ¶ 12. This court nonetheless reversed the orders of termination because the circuit court had lost competency by not complying with Wis. Stat. § 48.315(2). ***April O.***, 2 W.I. App. 70, 607 N.W.2d 927, ¶¶ 1, 12.

claim ignores ample evidence in the record supporting the jury's conclusion that the Department made reasonable efforts to comply with the CHIPS order. Rachel neglected to timely raise her competency claim. We therefore affirm the order.

By the Court. – Order affirmed.

This opinion will not be published. *See* Wis. Stat. Rule 809.23(1)(b)(4).

Sheboygan County Dep't of Soc. Servs. v. Matthew S.

2004AP0901

SUPREME COURT OF WISCONSIN

2005 WI 150; 705 N.W.2d 664; 2005 Wisc. LEXIS 937

October 17, 2005, Decided

OPINION:

Motion for reconsideration denied.

JUDGES: Prosser, J., dissents.

Prosser, J., dissents

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 04-0901

In re the Termination of Parental Rights to
Joshua S., a Person Under the Age of 18:

Sheboygan County Department of Health and Human Services,

Petitioner-Respondent,

v.

Matthew J.S.,

Respondent-Co-Appellant,

Rachel B.,

Respondent-Appellant-Petitioner.

MOTION FOR RECONSIDERATION

Now comes the State of Wisconsin, by Sheboygan County Assistant District Attorney Mary T. Wagner, respectfully requesting that the Wisconsin Supreme Court reconsider its opinion in the above-captioned case, which was decided on June 22, 2005. The State brings this Motion pursuant to Wis. Stats. §§ 809.64 and 809.14, on the basis that granting Rachel B.'s request to dismiss the termination of parental rights action against her infringes upon her son, Joshua's, due process right to have his time spent in the limbo of foster care expeditiously concluded and his corresponding opportunity to be adopted decided in a timely fashion.

The State believes that this due process right arises as a result of the U.S. Congress' and the Wisconsin State Legislature's adoption and implementation of the federal Adoption and Safe Families Act of 1997.[1] This legislation effected a sea change on a national level in both social policy and the conditions for dispersal of federal foster care funds, shifting from a long-held emphasis on family reunification to one of discouraging lengthy stays in foster care because of their demonstrated negative effects upon children, and instead promoting more adoptions. As one commentator has described this change in direction, "[w]ith the passage of the 1997 Adoption and Safe Families Act ("ASFA"), foster care funding laws have shifted the emphasis from family preservation to child safety with the intention of assuring permanency for children with the understanding that such a shift may mean giving up on parents."[2]

In this case, which was recently decided by the Wisconsin Supreme Court, a majority of the Court concluded that the state statutes governing delays in termination of parental rights actions were to be strictly construed, and that failure to strictly comply with procedural requirements stripped the trial court of competency to hear the case.[3] The State respectfully asks the Court to reconsider its conclusion that "children such as Joshua S., and their parents, clearly have a due process right to have these

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[1] Pub. L. No. 105-89, 111 Stat. 2155 (1997).

[2] Deborah L. Sanders, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Foster Care Funding Statutes from 1961 to Present*, 29 J. Legis. 51, 52 (2002).

[3] *Sheboygan County Department of Health and Human Services v. Matthew S. and Rachel B.*, 2005 WI 84, ¶ 37 (2005).

decisions determined within the time limits set by the legislature . . . "[4] to encompass a more expansive interpretation of what "due process" requires in this case in light of this critical change in federal and state law. One of the most notable changes in the federal and state law was the creation of the "fifteen/twenty-two rule," which mandates that prosecutors must – in a variety of specified circumstances – initiate TPR actions for children who have spent fifteen of the previous twenty-two months in foster care,[5] a decision which had previously been left to the prosecutor's discretion.[6]

As the U.S. Supreme Court has noted in one of its landmark cases governing termination or parental rights proceedings and the fundamental due process rights of parents in these cases, *Stanley v. Illinois*, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation, and firmly establishes that what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[7] The Stanley court also cautioned that "[t]he establishment of prompt, efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance

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[4] *Sheboygan County Department of Health and Human Services v. Matthew S. and Rachel B.*, 2005 WI 84, ¶ 36 (2005).

[5] Wis. Stat. § 48.417(1).

[6] Wis. Stat. §§ 48.25 and 48.42 (Wis. Stats. 1995-1996).

[7] *Stanley v. Illinois*, 405 U.S. 645, 650 (1972)

in constitutional adjudication. *But the Constitution recognizes higher values than speed and efficiency.*"[8]

Less than a decade later, the Court would explain in *Lassiter v. Dept. of Social Services* that the phrase "due process" expresses a requirement of "fundamental fairness," a requirement whose meaning can be "as opaque as its importance is lofty."[9] Applying the Due Process Clause "is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."[10]

It is undisputed in this case that, with the exception of the trial court's lapse in strictly following procedural requirements regarding statutory time limits in light of the many delays occasioned by the unavailability of counsel and the trial court's calendar, the progress of the termination proceeding itself, from the filing of the petition to the fact-finding hearing, was scrupulously fair to the Appellant, Rachel B. What is unquestionably and fundamentally **unfair**, however, is the effect of the Court's ruling on the child, Joshua S., who has spent the entirety of his three years on earth in foster care, and will continue to spend more time in foster care as the case against Rachel B. winds it way again through the lower courts. This is a result clearly at odds with the intent of both Congress and the state legislature in their respective enactments of the Adoption and Safe Families Act of 1997, a law designed to grant to children more protection from

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[8] *Stanley* at 656 (emphasis added).

[9] *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24 (1981).

[10] *Lassiter* at 24-25.

the damaging effects of lengthy foster care placement than had existed for decades under the previous federal laws.[11]

For these reasons, the State respectfully asks the Wisconsin Supreme Court to reconsider its ruling in this case, and to reinstate the trial court's Order terminating Rachel B.'s parental rights to Joshua S.

Respectfully submitted this 6th day of July, 2005,

JOSEPH DeCECCO
Sheboygan County District Attorney

By: MARY T. WAGNER
Assistant District Attorney
STATE BAR No. 1029006

Attorneys for Petitioner-Respondent
615 North 6th Street
Sheboygan, Wisconsin 53081
(920)459-3040

[11] See Deborah L. Sanders, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Foster Care Funding Statutes from 1961 to Present*, 29 J. Legis. 51, 52 (2002), describing the passage and goals of both the federal 1980 Adoption Assistance and Child Welfare Act and the preceding, unnamed federal 1961 Act.

[LOGO]

OFFICE OF THE DISTRICT ATTORNEY
SHEBOYGAN COUNTY
615 North 6th Street
Sheboygan, WI 53081-4692

[Names Omitted In Printing]

March 3, 2005

Ms. Cornelia G. Clark
Clerk of the Wisconsin Supreme Court
110 East Main Street, Suite 215
P.O. Box 1688
Madison, Wisconsin 53701-1688

Re: In re the Termination of Parental Rights to Joshua S., a Person under the age of 18:

Sheboygan Co. DH&HS, Petitioner-Respondent,
v.
Matthew S., Respondent-Co-Appellant,

Rachel B., Respondent-Appellant-Petitioner

Appeal No. 04-0901

Dear Ms. Clark,

Pursuant to Wis. Stat. § 809.19(10), I would like to bring the following matters to the Wisconsin Supreme Court's attention as "supplemental authority" relevant to this case, which I understand may see oral arguments on or about April 12.

- *In the Interest of R.H.*, 147 Wis.2d 22 (Wis. App. 1988), affirmed by an equally divided Wisconsin Supreme Court, 150 Wis.2d 432 (Wis. 1989). This case predates the keystone *B.J.N.* decision regarding competency challenges based on violations of time limits.

The central issue in *R.H.* was whether certain Chapter 48 time limits were to be construed as directory or mandatory. A philosophically divided Court of Appeals overturned the trial court's ruling extending dispositional orders in a juvenile case and a CHIPS case. The case contains lengthy and thoughtful analyses of the liberty interests involved in these types of proceedings which involve on-going court supervision of a child, and the legislature's intent to protect a child's right to procedural due process by ensuring a speedy disposition of allegations affecting the child. It is the Department's belief that these particular liberty interests are inherently distinguishable from a parent's fundamental liberty interest placed at risk in a TPR proceeding, and therefore deserve separate analysis.

- The federal *Adoption and Safe Families Act of 1997,* Pub. L. No. 105-89, 111 Stat. 2155 (1997). This law was the first overhaul of federal child welfare law since 1980, and was enacted in large part in an effort to reduce "foster care drift" and to increase the number of children moving from foster care to adoption, The federal law required that states move to terminate parental rights in most cases where children had spent fifteen of the previous twenty-two months in foster care.

- Wis. Stat. § 48.417, introduced as the *Wisconsin Adoption and Safe Families Act,* which was enacted shortly thereafter to conform state law to the federal statute § 48.417(1) also requires termination proceedings to be initiated when children have spent fifteen of the previous twenty-two months in foster care.

I have enclosed the original and eight copies of this letter as required, and am sending copies to Attorney John Grau (attorney for Respondent-Appellant-Petitioner Rachel B.), Attorney James Fullin (attorney for Respondent-Co-Appellant

Matthew S.), Attorney Fred Wilk (guardian ad litem), Matthew Schultz, and Assistant Attorney General Michael Bauer.

Respectfully yours,

/s/ Mary T. Wagner
Mary T. Wagner
Assistant District Attorney

cc: Attorney John Grau
Attorney Fred Wilk
Assistant Attorney General Michael Bauer
Assistant State Public Defender James Fullin
Matthew Schultz